Supreme Court, U.S.
FILED
01-363 AUG 27 2001
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No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 2001**

---

**DR. RICHARD E. BUSCH, Petitioner**

**v.**

**UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Respondent**

---

# PETITION FOR WRIT OF CERTIORARI TO THE 11th CIRCUIT COURT OF APPEALS

**SCOTT K. HEDEEN**
**COUNSEL OF RECORD FOR PETITIONER**
**P.O. BOX 2265**
**DOTHAN, AL 36302**
**(334) 793-7771**

10 pp

## QUESTION PRESENTED FOR REVIEW

Whether the non-compliance with a mandatory notice requirement in a federal long arm statute deprives an individual of his Fifth Amendment life, liberty or property due process rights?

UNITED STATES SUPREME COURT

| | | |
|---|---|---|
| **DR. RICHARD L. BUSCH,** | : | |
| | : | |
| **Appellant,** | : | |
| | : | |
| **vs.** | : | **CIVIL ACTION** |
| | : | **NO. _____** |
| **UNITED STATES COMMODITY FUTURES TRADING COMMISSION,** | : | |
| | : | |
| **Appellee,** | : | |

## APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

**COMES NOW**, Appellant, **DR. RICHARD E. BUSCH**, and files the following persons/corporations in compliance with Rule 29.6. Some of the persons/corporations are listed based on documents or motions filed by the Appellee.

Alaron Trading Corporation

William Amos

Lee Benton

Dr. Richard E. Busch

Tim Carey

Chateauforte Consortium, Inc.

Mario De Diego

Cheryl Fitzpatrick

Financial Planning Alliance International

Richard Foelber

Floyd Frieson

Globex, B. V. I., Ltd.

John Hanks

Scott Hedeen

Kevin Lamardi

Gloria Matthews

Millennium Fund

Jack Mockamer

Judge Edward Nelson

Brigitte Nuss

Nancy Page

Alton Parker

Clay Ragsdale

Regions Bank

David Todd Scarborough

Howard Smith

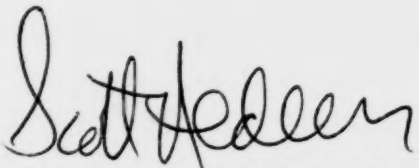
John La Tourette

Lynda Villarrea

U.S. Commodity Futures Trading Commission

World EX, S.A.

**RESPECTFULLY** submitted, this 27th day of August, 2001.



**SCOTT K. HEDEEN (HED-002)**

**ATTORNEY FOR RICHARD E. BUSCH**
**POST OFFICE BOX 2265**
**DOTHAN, ALABAMA 36302**
**(334)793-7771**

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that I have mailed a copy of this Petition to Nancy Page, Attorney for Appellee, at Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581, this the 21st day of August, 2001.

Scott K. Hedeen

**SCOTT K. HEDEEN**

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 2001**

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**DR. RICHARD E. BUSCH, Petitioner**

**v.**

**UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Respondent**

---

---

**PETITION FOR WRIT OF CERTIORARI**
**TO THE 11TH CIRCUIT COURT OF APPEALS**

---

Petitioner, Dr. Richard E. Busch, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Eleventh Circuit Court of Appeals.

## OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's denial of a Petition for Rehearing was issued on May 30, 2001, and is attached as Appendix A. The opinion of the Eleventh Circuit Court of Appeals, U.S.C.F.T.C. vs. Busch, at al, No. 00-15016 (February 23, 2001), is unreported and attached as Appendix B. The opinion of the United States District Court, Northern District of Alabama, Southern Division in U.S.C.F.T.C. vs. Busch, CV-98-N-1755-S (March 14, 2000). is unreported and is attached as Appendix C.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The opinion was entered on February 23, 2001, and became a Judgment when Dr. Busch's Petition for Rehearing was denied on May 30, 2001.

## COMPLIANCE WITH CERTIFICATE OF SERVICE

A copy of this Petition has been served upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001. A copy of this Petition has also been sent to the United States Commodity Futures Trading Commission in care of Nancy R. Page, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581

## CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . nor shall private property be taken for public use without just compensation.

## STATUTORY PROVISIONS INVOKED

17 C.F.R. 15.05, April 1, 2000. A complete text of which is attached to the Appendix.

## STATEMENT OF THE CASE

This is a Civil Case. On July 8, 1999, the commission filed its Complaint in the United States District Court for the Northern District of Alabama (CD-98-N-1755-S). After unsuccessfully attempting to serve Dr. Busch, the Commission filed a Motion to Permit a Commission Staff Member to personally serve the defendants on November

25, 1998. The trial court granted that Motion. On January 19, 1999, an execution returned on defendant Busch was filed in the Northern District of Alabama Court.

The trial court entered a default judgment against defendant Busch on March 5, 1999. In that default order the trial judge found that Dr. Busch was personally served. Subsequent to the default judgment being taken Dr. Busch filed numerous motion to have the Default Judgment set aside.

In its March 14, 2000, order, the District Court held that Dr. Busch was served pursuant to 17 C.F.R. 15.05(b). The trial court ultimately entered a default judgment in the amount of Forty-Five Million Dollars ($45,000,000.00) and issued a warrant for his arrest for being in contempt of court. Dr. Busch, pursuant to Rule 54(b) of the Rules of Civil Procedures, filed an appeal to the 11th Circuit.

The 11th circuit, in case 00-15016, affirmed the lower courts decision on February 23, 2001. Dr. Busch's Motion for Rehearing was denied by the 11th Circuit on May 30, 2001.

Dr. Busch argued that since he was never sent a copy of the summons and complaint before the Default Judgment, the court did not have personal jurisdiction over him. The C.F.T.C. used 17 C.F.R. 15.05 (b) to serve Dr. Busch. That statute states that the domestic agent shall send a copy of the summons and complaint to the foreign broker promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the commission.

## FEDERAL JURISDICTION TO HEAR CASE

The District Court for the Northern District of Alabama Southern Division had subject matter jurisdiction to hear this matter based on § 6c of the Commodities Exchange Act (CEA), 7 U.S.C. § 13a-1 (1994).

## REASONS FOR GRANTING THE WRIT

As the decisions of the trial and appellate court alludes to the question of the due process ramifications of non compliance with a mandatory notice requirement in a federal long arm statute has not been settled by this Court.

The expansion of substituted service statutes and international commerce makes the settlement of this question relevant.

> "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." McDonald v. Mabee, 243 U.S. 90, 37 S. Ct. 343, 61 L.Ed. 608 (1917)

Although Justice Holmes' above quote shows that the interplay between due process and substituted service is not new, there exists an absence of case law addressing the due process implications of non compliance with the notice requirement of a Federal long arm statute.

In the case at bar, the District Court and the 11th Circuit Court of Appeals address this absence.

The District Court in its order of March 14, 2000, admits it could not find any cases that address the Appellant's argument that service was not valid under 17 C.F.R., Section 15.05(b)(1999). In point of fact, the Court concedes that National Equipment Rental LTD v. Szukhent, 375 U.S. 311, 317-318 (1964) could be used by Busch to support his argument.

In its February 23, 2001, order, the 11th Circuit Court does not dispute that 17 C.F.R. 15.05(b) compels the domestic agent to transmit the summons and complaint to the foreign broker, but the court stated:

> "Busch would have this Court read the regulations as requiring C.F.T.C. to ensure that Alaron fulfilled its legal obligations to forward the summons and complaint on to Busch. Nothing in the case law or regulations themselves supports such a reading, nor do we think it makes sense to place a Plaintiff at the mercy of a Defendant's agent in the service of process upon a Defendant. We find that service of pro-

cess was completed upon delivery of the summons and complaint to Busch's lawful agent".

Dr. Busch asks this Court to take the principle first laid out in National Equipment Rental and to apply it to today's ever expanding world of substituted service.

In National Equipment, this court dealt with substituted service upon an authorized agent. Interestingly, this Court stated:

> "We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice, such as Schroeder v. City of New York, 371 U.S. 208; Walker v. Hutchinson City, 352 U.S. 112; and Mullane v. Central Hanover Tr. Co., 339 U.S. 306. Similarly, as the Court of Appeals recognized, this Court's decision in Wuchter v. Pizzutti, 276 U.S. 13, is inapposite here. In that case a state nonresident motorist statute which failed to provide explicitly for communication of notice was held unconstitutional, despite the fact that notice has been given to the defendant in that particular case. Wuchter dealt with the limitations imposed by the Fourteenth Amendment upon a statutory scheme by which a State attempts to subject nonresident individuals to the jurisdiction of its courts". National Equipment Rental at 315.

In his Dissent in National Equipment, Justice Brennon, was concerned that the agency agreement for service of process did not contain a mandatory notice provision. Justice Brennan stated:

> "I would require that the appointment include an explicit condition that the agent after service trans-

> mit the process forthwith to the principle. Although our decision in Wuchter v. Pizzutti, 276 U.S. 13, dealt with the constitutionality of a state statute, the reasoning of that case is persuasive that, in fashioning a federal agency rule, we should engraft the same requirement upon Rule 4 (d) (1)". National Equipment Rental at 334

It would seem that Congress drafted 17 C.F.R. 15.05 (b) with Justice Brennan's dissent in mind. 17 C.F.R. 15.05 is a statute designed for and used by the C.F.T.C. in effectuating service of process on a foreign broker. The C.F.T.C. and the U.S. Attorney's Office are the only entities capable of using this statute to effectuate personal service. In that statute, the provision in controversy in the case at bar reads as follows:

> "A futures commission merchant or an introducing broker who has been served with, or to whom there has been delivered, a communication issued by or on behalf of the commission to a foreign broker, a customer of the foreign broker, or the foreign trader shall transmit the communication promptly and in a manner that is reasonable under the circumstances, or in a manner specified by the commission in the communication to the foreign broker, a customer of the foreign broker, or the foreign trader" (Emphasis Added).

It is C.F.T.C.'s position that the mandatory provision of that statute does not mean what it says. However, had Congress wanted the entire service of process procedure to consist only of the depositing of the summons and complaint with the domestic agent, it could have done so. Congress, however, did not stop there.

Dr. Busch has long maintained that he was not sent a copy of the summons and complaint by anyone, prior to the default judgment being entered. The C.F.T.C. does not maintain that Dr. Busch was sent a copy of the summons and complaint by the domestic agent, but rather maintains that the notice provision is not required.

This argument seems particularly puzzling because the statute itself states that the commission can select the method of notice and instruct the domestic agent as to how the agent is to notify the trader. The commission, apparently, did not so instruct the agent because the commission has provided no proof that it did. Additionally, the commission has provided no proof that the domestic agent provided notice to Dr. Busch. Rather than leave the commission as a helpless bystander, the statute actually provides the commission with the opportunity to instruct the domestic agent as to the particulars of notification. By failing to instruct the domestic agent as to the specific type of notice and failing to follow up to insure that notification has taken place, it is the commission that placed itself in the bystander role. This not withstanding, the commission still could have ensured that the notice provision was complied with by merely requiring the domestic agent to send the commission a copy of any notification sent to Dr. Busch. Clearly, the commission, for what ever reason, did not follow up with any safe guards to ensure that the notice requirement was satisfied.

The C.F.T.C. is the party arguing for effective service of process. They, therefore, have the burden of proof with regard to service of process and they are relying on 17 C.F.R. 15.05 to prove service of process. Reliance on a statute to allow a particular type of service comes with the added responsibility of following that statute in its entirety and specifically. This is particularly true when the statute is in the nature of a long arm statute. As set out in Silvious v. Pharaon, 54 F. 3d 697 (11th Cir. 1995)

> "a plaintiff may effect proper service on an agent in the United States pursuant to Rule 4(e) (2), so long as that service complies with the requirements of the due process clause and the relevant statute. Additionally, substituted service via a statute can meet due process concerns for a foreign national as long as the substituted service provides notice reasonably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Part of the two pronged theory of sufficiency of service is that notice be given. Justice Jackson articulated that need in Mullane vs. Central Hanover Tr. Co., 339 U.S. 306 (1950). Justice Jackson stated:

> "Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only it interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which (339 U.S. 306, 314) would place impossible or impractical obstacles in the way could not be justified.
>
> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "The fundamental requites of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane at 314, 315

With the advent of computers, facsimile machines, wireless telephone communication and the world wide internet, the technology available by which to give notice has exploded since the times of Equipment Rental, Wuchter and Mullane. The time is ripe for this court to bring a substituted service due process examination into the age of technology.

## STATUTORY CONSTRUCTION

On June 18, 2001, this Court announced its decision in Duncan v. Walker (208 F.3d 357) supreme court No. 00-121. In Duncan the court was asked to decide between conflicting interpretation of a Federal Statute regarding habeas corpus. At issue was the use of the word "State" in the statute and how the word "State" would effect a defendant post conviction relief.

The Court opinion stated:

> "Our task is to construe what Congress has enacted. We begin, as always, with the language of the statue. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000) *Public Employees Retirement System of Ohiov. Betts*, 492 U.S. 158, *175* (1989); *Watt v. Energy Action Ed Foundation*, *454* U.S. 151. 162 (1981). Respondent reads §2244(d)(2) to apply the word "State" only to the term "post conviction" and not to the phrase "other collateral." Under this view, a properly filed federal habeas petition tolls the limitation period. Petitioner contends that the word "State" applies to the entire phrase "post-conviction or other collateral review." Under this view, a properly filed federal habeas petition does not toll the limitation period . . .
>
> Further, were we to adopt respondent's construction of the statute, we would render the word "State" insignificant, if not wholly superfluous. "It is our duty 'to give effect, if possible, to every clause and word of a statute,'" *United States v. Menasche*, *348*

> U.S. 528, 538-539 (*1955*) (quoting *Montclair v. Ramsdell, 107* U.S. 147, 152 (1883); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction:); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'"). We are thus "reluctant to treat statutory terms as surplusage: in any setting. *Babbit v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687 698 (1995); see also *Ratzalf v. United States*, 510 U.S. 135, 140 (1994). We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme as does the word "State" in the federal habeas statute.

Like the word "State" in the Duncan case, the word shall in 17 C.F.R. 15.05 (b) should be given its normal statutory meaning and should not be reduced to a superfluous, void or insignificant word. Clearly the requirement of notice set out by Congress in 17 C.F.R. 15.05 (b) was done with a particular purpose in mind. If the C.F.D.C. wishes to use that statute as a basis for substituted service, it should be held to the entire statute and its obvious meaning and purpose.

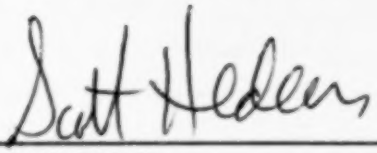
**WHEREFORE**, the Appellant, asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted this the 27th day of August, 2001.

## CERTIFICATE OF SERVICE

A copy of this Petition has been served upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC, 20530-0001. A copy of this Petition has also been sent to the United States District Court Com-

modity Futures Trading Commission in care of Nancy R. Page, Three Lafayette Center, 1155 21st Street, N.W., Washington, DC 20581.



**OF COUNSEL**
**Attorney of Record for Dr. Busch**
**P.O. Box 2265**
**Dothan, AL**
**36302**
**(334) 793-7771**

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 00-15016 BB

---

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

versus

CHATEAUFORTE CONSORTIUM, INC., THE
WORLDEX, S.A.,
FINANCIAL PLANNING ALLIANCE
INTERNATIONAL,
JOHN LA TOURETTE, et al.,

Defendants,

RICHARD E. BUSCH, Dr.,

Defendant-Appellant.

---

On Appeal from the United States District Court for the
Northern District of Alabama

---

BEFORE: TJOFLAT, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, RICHARD E. BUSCH, is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

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No. 00-15016
Non-Argument Calendar

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D.C. Docket No. 98-01755-CV-N-S

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff-Appellee,

versus

CHATEAUFORTE CONSORTIUM, INC.,
THE WORLDEX, S.A., et al.,

Defendants,

RICHARD E. BUSCH, Dr.,

Defendant-Appellant.

---

Appeal from the United States District Court for the
Northern District of Alabama

---

(February 23, 2001)

**Before TJOFLAT, BLACK and BARKETT, Circuit Judges.**

PER CURIAM:

Richard E. Busch appeals the denial of this Federal Rule of Civil Procedure 60(b) motion to vacate a default judgment on the grounds of insufficient service of process. In response, the U.S. Commodity Futures Trading Commission ("CFTC") argues that, pursuant to the fugitive disentitlement doctrine, this Court should not permit Busch to litigate the merits of his appeal while he remains a fugitive.[1] In the event we reach the merits, CFTC argues that service of process was properly executed both through a domestic service agent, as permitted by Fed. R. Civ. P. 4(e)(2) and 17 U.S.C. § 15.05, and directly to Busch in Panama, in compliance with Fed. R. Civ. P. 4 (f)(3). Busch responds that the fugitive disentitlement doctrine does not apply because the facts of this case are not that he was in the United States and then fled the United States in anticipation of these proceedings, and because he was not a fugitive in a criminal case seeking to defend himself in a civil case but merely defending against civil claims. Rather than resolve this question, we address the issue raised by Appellant on appeal and affirm the district court.

We review both the denial of a Rule 60(b) motion and a denial of a request to vacate a default judgment for abuse of discretion. See Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993) (Rule 60 (b)); Florida Physician's Ins. Co. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993) (denial of motion to vacate default judgment reviewed for abuse of discretion).

In any case or controversy, a threshold question is whether the court has personal jurisdiction over the defendant. The issue of sufficiency of service of process implicates personal jurisdiction; absent

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[1] At present, a warrant has been issued for the arrest of Busch and, as he has failed to appear, he is currently a fugitive. In a motion for summarily dismissal that was carried with the case, CTFC previously argued that the fugitive disentitlement doctrine should prevent Busch from being able to litigate the merits of his case. We deny the motion for summary dismissal. Although summary dismissal was not appropriate in this case, we do not resolve the issue of the applicability of the fugitive disentitlement doctrine to these facts.

valid service of process, proceedings against a party are void. Aetna Business Credit Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434,435 (5th Cir. 1981).[2] Whether service of process complied with the Federal Rules of Civil Procedure is a question of law which we review de novo. Silvious v. Pharaon, 54 F.3d 697, 700 (11th Cir. 1995).

Under Fed. R. Civ. P. 4(e)(2), service of process may be effected by delivering a copy of the summons and the complaint to "an agent authorized by appointment or by law to receive service of process." Here, the record clearly reflects that Busch was served process in accordance with Rule 4(e). Under 17 C.F.R. § 15.05, Alaron Trading Corporation ("Alaron") was a lawful agent of Busch, a "foreign trader" under the regulations. Further, it is undisputed that CFTC served a copy of the summons and complaint upon Alaron. Busch would have this Court read the regulations as requiring CFTC to ensure that Alaron fulfilled its legal obligation to forward the summons and complaint on to Busch. Nothing in the case law or regulations themselves supports such a reading, nor do we think it makes sense to place a plaintiff at the mercy of a defendant's agent in the service of process upon a defendant. We find that service of process was completed upon delivery of the summons and complaint to Busch's lawful agent.[3] Accordingly, the court's jurisdiction was proper in this case.

As the issue of sufficiency of service of process was the only claim raised on appeal by Busch, the district court's denial of Busch's motion to vacate the default judgment is

AFFIRMED.

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[2]In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

[3] Since we found that service of process was proper under Fed. R. Civ. P. 4(e)(2) and 17 U.S.C. § 15.05, we do not need to address whether Busch was served in Panama in compliance with Fed. R. Civ. P. 4(f)(3).

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ALABAMA**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| **UNITED STATES COMMODITY FUTURES COMMISSION,** | ] | |
| Plaintiff(s), | ] | |
| vs. | ] | CV-98-N-1755-S |
| **THE CHATEAUFORTE CONSORTIUM, et al,** | ] | |
| Defendant(s). | ] | |

**Opinion and Order**

## I. Introduction.

The court has for consideration the motions of defendant Dr. Richard E. Busch to alter, amend or vacate judgment and stay of execution filed June 16, 1989, (Document 52) and his motion to dismiss for want of personal and subject matter jurisdiction filed July 12, 1999, (Document 60). The parties have briefed the pertinent issues. The court has twice taken evidence relevant to the issues and heard counsel in oral argument. Upon due consideration of all the matters presented in support of and in opposition to the motions, the court is of the opinion that each of the motions should be denied in all respects.

## II. Background for the Motions.

On July 7, 1998, the United States Commodity Futures Trading Commission (the "Commission") filed a complaint against The Chateauforte Consortium, Inc., Worldex, S.A., Financial Planning Alliance, John La Tourette, Dr. Richard E. Busch, James Michael Hanks,

and William E. Amos alleging that they had violated the anit-fraud, registration, disclosure, and record-keeping provisions of the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. That same day, this court issued a statutory *ex parte* restraining order freezing assets of the defendants, protecting certain records and appointing a receiver for the defendants' assets. The court also entered an order requiring the defendants to show cause why a preliminary injunction should not issue against them. The plaintiff was authorized to conduct expedited discovery.

Thereafter, the Commission employed Morgan & Morgan, a Panamanian law firm, to serve process on Dr. Busch at his residence in Panama City. The firm retained by the Commission served the summons and complaint on Busch's maid at his residence but the defendant has never filed an answer. Service was also attempted at an Indiana residence and business, but the only response was by letter from an individual who identified himself as Richard E. Busch, III, the son of defendant Richard E. Busch, Mr. Busch, III, strenuously objected to the Commission's attempts to serve Dr. Busch at the Indiana address. The summons and complaint were mailed to Busch's Panamanian address several times but were returned unclaimed.

On November 25, 1988, the court entered an order granting the Commission staff authority to personally serve Dr. Busch with the summons and complaints.

On January 5, 1999, Ms. Lynda Villarreal of the Commission's Chicago office delivered the summons and complaint to Alaron Trading Corporation in Chicago. Illinois. The plaintiff asserts that pursuant to 17 C.F.R. § 15.05, Alaron is Busch's agent as a matter of law because Busch maintained control over two commodity futures trading accounts at Alaron.[1] The Commission contends that on January 9, 1999, David Scarborough, a resident of Alabama, traveled to Panama where he personally served Dr. Busch in Panama City.

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[1]That regulation provides in pertinent part:

§ 15.05 Designation of a futures commission merchant or introducing broker to be the agent of foreign brokers, customers of a foreign broker, and foreign traders.

(a) For purposes of this section, the term "futures contract" means any contract for the purchase or sale of any commodity for future delivery traded or executed on or subject to the rules of any contract market; the term "option contract" means any contract for the purchase or sale of a commodity option traded or executed on or subject to the rules of any contract market; the term "customer" means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term "communication" means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

(b) Any futures commission merchant who makes or causes to be made any futures contract or option contract for the account of any foreign broker or foreign trader, and any introducing broker who introduces such an account to a futures commission merchant, shall thereupon be deemed to be the agent of the foreign broker or the foreign trader for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker or the foreign trader with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. In the case of a futures commission merchant who makes or causes to be made any futures or option contract for the account of a foreign broker, the futures commission merchant and the introducing broker, if any, shall also be the agent of the customers of the foreign broker (including any customer who is also a foreign broker and its customers) who have positions in the foreign broker's futures or option contract account carried by the futures commission merchant for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the customer with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. Service or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant or to an introducing broker pursuant to such agency shall constitute valid and effective service or delivery upon the foreign broker, a customer of the foreign broker or the foreign trader. A futures commission merchant or an introducing broker who has been served with, or to whom there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, a customer of the foreign broker or the foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, a customer of the foreign broker or the foreign trader.

(c) It shall be unlawful for any futures commission merchant and for any introducing broker to open or cause to be opened a futures or options contract account for, or to effect or cause to be affected transactions in futures contracts or option contracts for an existing account or, a foreign broker or foreign trader unless the futures commission merchant or introducing broker informs the foreign broker or foreign trader prior thereto, in any reasonable manner which the futures commission merchant or introducing broker deems to be appropriate, of the requirements of this section.

On February 26, 1999, the Commission moved for entry of default against Dr. Busch and, pursuant to Fed. R. Civ. P. 55, for entry of a permanent mandatory injunction to require Dr. Busch to perform certain acts calculated to make whole the victims of his alleged fraudulent scheme. On March 5, 1999, default was entered, and the court concurrently entered an order granting a permanent injunction, other equitable relief, and civil monetary penalties. Dr. Busch was ordered *inter alia*, within thirty days of the order, to make full restitution to all persons who gave funds either directly, or indirectly, to the defendants as a result of the acts alleged in the complaint.

Thereafter, on April 14, 1999, the Commission moved the court to hold Dr. Busch in contempt for his alleged failure to comply with the order of March 5, 1999. Two days later on April 16, 1999, the court issued an order directing Dr. Busch to appear and show cause in open court on June 3, 1999, why he should not be adjudged in contempt of the court. On April 19, 1999, Dr. Busch filed a motion to set aside the default judgment based upon his assertion that he was never properly served with the summons and complaint. In particular, Busch claimed he was not personally served by Scarborough on January 9, 1999, in Panama City because on that date, he was in route to Zurich, Switzerland. Additionally, he contended that because he had never authorized anyone to act as an agent on his behalf for the purpose of getting U.S. citizens to invest money into the millennium fund, he had a meritorious defense to the action and that because he had no agent, the attempted service of process on Alaron was invalid.

On June 3, 1999, the court conducted a hearing on the plaintiff's motion to hold Busch in contempt and the defendant's motion to set aside the default judgment. The court denied the motion to set aside default judgment, and allowed Dr. Busch until midnight on June 21, 1999, to fully comply with the terms of the permanent injunction on pain of being adjudged in contempt and having a warrant issued for his arrest. On June 16, 1999, Dr. Busch moved the court to amend or vacate the judgment entered against him and to stay execution of the judgment. For the first time, he argued that he lacked the requisite minimum contacts with the United States to justify the courts of the United States in exercising jurisdiction of his person. In September of 1999, Busch submitted an affidavit from his wife, as well as other evi-

dence, which he claimed demonstrated that he was not in Panama on January 9, 1999, the date on which Mr. Scarborough testified he had personally served Busch with the summons and complaint in Panama City.

After several delays, the court conducted a hearing on the defendant's pending motions on January 24, 2000.

## III. Service of Process.

### A. 17 C.F.R. 15.05 & Fed. R. Civ. P. 4(e).

Dr. Busch's principal assertion is that he was not properly served with process in order to make him subject to the jurisdiction of this court. It is well settled that in the absence of valid service of process, proceedings against a party are void. *Aetna Business Credit Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981). When service of process is challenged, the party on whose behalf service is made has the burden of establishing its validity. *Familia De Boom, et al. v. Arosa Mercantil*, 629 F.2d 1134, 1139 (5th Cir. 1980); 5A CHARLES ALAN WRIGHT & AUTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1383 (1990). If the plaintiff produces evidence demonstrating a *prima facie* case as to the facts of service, the defendant may introduce evidence, such as uncontroverted affidavits, to rebut the plaintiff's contention. 5A CHARLES ALAN WRIGHT & AUTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353 (1990). The plaintiff then must be given an opportunity to respond by presenting relevant material in support of its argument that service was properly effectuated. *Id; See also Manufacturers Hanover Trust Company v. Ponsoldt*, 51 F.3d 938, 941 (11th Cir. 1995). In response to Dr. Busch's argument, the Commission has articulated multiple grounds to support its claim that Busch has been effectively and validly served with process in this action.

First, the Commission contends that Dr. Busch was properly served pursuant to Fed. R. Civ. P. 4(e) and 17 C.R.R. § 15.05(b) (1999) when Alaron Trading Corporation was served with a copy of the summons and complaint. In pertinent part, Fed. R. Civ. P. 4 (e)(2) instructs that service may be effected in any judicial district of the United States by "delivering a copy of the summons and complaint to an agent au-

thorized by appointment or by law to receive service of process." For purposes of this matter, the question of Alaron's agency is guided by 17 C.F.R. 15.05, which provides that any futures commission merchant who makes or causes to be made any futures contract for the account of any foreign broker or foreign trader is for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker or the foreign trader with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant, 17 C.F.R. 15.05 (b). Consequently, service or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant pursuant to such agency relationship shall constitute valid and effective service or delivery upon the foreign broker or trader. *Id.*

Under section 15.05 (b) then, Alaron was, for purposes of service, an agent of Dr. Busch. Foremost, it is clear that Dr. Busch was a "foreign trader" within the meaning of the regulation, as he maintained control over two commodity futures trading accounts with Alaron, both of which are part of the Millennium Fund, the subject of this lawsuit. Also, it is undisputed that Alaron is a futures commodities merchant subject to the regulation. Moreover, a "communication," is specifically defined to include a summons and complaint served on behalf of the Commission. It is undisputed that Lynda Villarreal of the Commission's Chicago, Illinois, office, delivered the summons and complaint to Alaron Corporation in January of 1999. Subsequently, on February 26, 1999, Ms. Villarreal's certification of service was filed with the court.

Dr. Busch maintains, however, that he was not properly served because the Commission has not proven that Alaron, upon receipt of the summons and complaint, transmitted notice of the suit to Dr. Busch. This argument also rests upon 17 C.F.R. 15.05 (b) which in pertinent part states:

> [a] futures commission merchant or an introducing broker who has been served with, or to whom there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, a customer of the foreign broker or the foreign trader shall transmit the communication promptly and in

> a manner which is responsible under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, a customer of the foreign broker or the foreign trader.

17 C.F.R. 15.05 (b). In other words, Dr. Busch contends that service of process does not become effective until the futures commission merchant actually forwards the summons and complaint to the foreign trader.[2] The argument is not well taken.

Having thoroughly researched the matter, the court has found no published authority that addresses the precise issue presented here - whether as part of proving effective service, the Commission must demonstrate that Alaron actually complied with its duty to transmit the summons and complaint to Dr. Bush. However, *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 317-318 (1964) is in the ball park and provides some useful insight. In *Szukhent*, the lease which was the subject of the action named one Florence Weinberg as an agent of the defendant with the authority to receive service of process in the event of a default. Upon the defendant's default, the plaintiff filed suit and served Ms. Weinberg, who immediately forwarded a copy of the complaint and the summons to the defendant. The Court concluded that Ms. Weinberg was the duly appointed agent of the defendants to receive service of process. Two comments are worthy of note here. The Court said, "[w]e need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made." 375 U.S. at 315. It also noted that "a different case would be presented if Florence Weinberg had not given prompt notice to the (defendants), for then the claim might well be made that her failure to do so had operated to invalidate the agency." 375 U.S. at 318.

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[2]The court finds it noteworthy that the defendant does not actually deny that he received the summons and complaint from Alaron but only that the plaintiff has not proven that he received them. Thus, he does not and cannot argue that he has been denied due process by subjecting him to the personal jurisdiction of this court based upon the service of process had upon Alaron.

*Szukhent* may be read by some to support Dr. Busch's argument. In the view of the court that is not so. First, the *Szukhent* court specifically acknowledged that it was not presented with the question presented here, though it did suggest in dicta that the answer might have been different had the agent there not given actual notice to the defendants. This court's reading of *Szukhent* suggests that such failure would probably have implicated the Due Process Clause of the Fourteenth Amendment.

The present case is different, First, the agency relationship in *Szukhent* was created by agreement of the parties and was governed by the parties' agreement. Here, however, the agency of Alaron was created by operation of law when, as a futures commission merchant, it made or caused to be made futures contracts for the account of Richard E. Busch, a foreign broker or trader. The court has grave doubts that Alaron could so easily divest itself of its lawfully imposed role as the agent of Dr. Busch for receiving service of process by the simple expedient of shirking its duty.

Moreover, the court is satisfied that the law does not impose upon the Commission the burden that Dr. Busch would like. The plaintiff language of 17 C.F.R. 15.05 provides that transmission to a foreign trader by a merchant shall occur when the merchant "has been *served with*, or to whom there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker or the foreign trader" (emphasis added). This language clearly suggests that service is completed upon delivery of the summons and complaint to the futures merchant and not when they are subsequently transmitted to foreign broker or trader. It would be strange indeed if a foreign broker or trader who chooses to do business in the United States through a domestic futures commission merchant could avoid service of process in the United States by virtue of the fact that the agent, chosen by him, fails of his duty to notify the foreign broker or trader of the service. Such a rule would place the Commission at the mercy of the defendant's agent and would frustrate the Commission in the performance of its statutory duty to regulate the activities of persons such as Dr. Busch, and, in so doing, to protect the citizens of the United States from unscrupulous traders.

This case illustrates the wisdom of the scheme established by section 15.05. Dr. Busch's conduct for the past one and one-half years

strongly suggests that he has attempted and continues to attempt to avoid the processes of this court, an effort facilitated by his residence in a foreign country.

Finally, where, as here, the Commission has properly delivered the summons and complaint to the defendant's statutory agent in accord with Rule 4 Section 15.05 and has filed the process server's return of service with the court, there arises a rebuttable presumption that the agent has complied with its duty to further transmit the summons and complaint to the defendant and that service of process has been properly and validly effected.

Under these circumstances, the court finds that defendant Richard E. Busch was validly served with the summons and complaint when Ms. Villarreal delivered copies of the same to Alaron Corporation on January 5, 1999, and he is, thus, properly before this court.

**B. Fed. R. Civ. P. 4(f).**

Alternatively, the Commission asserts that Busch was personally served under Fed. R. Civ. P. 4 (f)(2)(C)(i) when Mr. Scarborough personally delivered copies of the summons and complaint to him in Panama City on January 9, 1999. Rule 4(f) provides that a defendant not within a judicial district of the United States may be personally served with a summons and complaint, as long as personal service is not prohibited by the law of the country in which service is to be had. Defendant Busch asserts by affidavit of a Panamanian lawyer that the law of Panama prohibits service of process in the manner described by the plaintiff's witnesses.

Rule 44.1, Fed. R. Civ. P., provides that a party who intends to address an issue concerning the law of a foreign country shall give notice of his intent to do so through pleadings or other reasonable written notice. The defendant here has complied with that requirement. When considering an issue concerning foreign law, however, the court may consider any relevant material or source. *Id.*

After a review of the pleadings, record, and other authorities, the court is convinced that the plaintiff has not met its burden to establish service under Fed. R. Civ. P. 4(f)(2)(C)(i); *See Familia De Boom*, 629 F.2d at 1139 (when service of process is challenged, the party on whose behalf service is made has the burden of establishing

that service was properly done.). In particular, the court notes the absence of any substantive discussion concerning whether Scarborough's personal service of Dr. Busch was prohibited by Panamanian law. See Fed. R. Civ. P. 4(f)(2)(c). Such discussion would have been particularly helpful in light of the fact that the defendant has presented a letter from an attorney in Panama which states that under Panamanian law, service from foreign courts is done through Panamanian Judges or Courts or General Attorney, through a procedure called "Commissions Rogatory" or "Letters Rogatory." Accordingly, the Commission, as the party on whose behalf service was made, has failed to establish effective service pursuant to Fed. R. Civ. P. 4(f)(2)(C)(i).

The court does not wish to be understood as accepting the testimony of Mrs. Jean Irelan Busch and Dr. Busch's son, Joseph Paul Busch, that Dr. Busch was traveling to Zurich and that the person actually served on the occasion sworn to by the Commission's witnesses was the son.[3] As noted at the hearing of January 24, 2000, the testimony of Joseph Paul Busch, who stated he was the son of the defendant, was well rehearsed and was given by rote. With regard to Mrs. Busch, again as noted at that hearing, anyone who is capable of purchasing Greek passports is capable of purchasing other evidence. Generally, the court found the defendant's witnesses to be not credible. In comparison, the court is satisfied that the witnesses presented by the plaintiff were generally credible. Howard Smith and David Scarborough testified in person, on two occasions, that they were in Panama when the delivery of the summons and complaint was made, and that Scarborough "handed" the envelope containing the summons and complaint to Dr. Busch through his car window. Mr. Scarborough was allowed to view the person of Joseph Paul Busch and stated unequivocally that he was not the person served by Scarborough in Panama City.

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[3]"[A]ny factual quesions raised by affidavits or other evidence should be determined by the court in accordance with Rule 12(d)." 5A CHARLES ALAN WRIGHT & AUTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353 (1990).

The court finds as a fact that Dr. Richard E. Busch, the defendant in this action, was the person served by Mr. Scarborough in Panama City on January 9, 1999.

## IV. Personal Jurisdiction.

In his July 12, 1999, submission, Dr. Busch contended that he lacked the continuous and systematic contacts or sufficient minimum contacts with the United States to support personal jurisdiction, either general or specific of this court. The Commission argues to the contrary and that as a matter of pleading, Busch waived a lack of personal jurisdiction defense by filing a "limited appearance to set aside default judgment under Rule 55b and 60b due to insufficiency of process" while failing to assert that he did not have sufficient contacts with the United States to allow the court to exercise jurisdiction of his person.

Because the court is convinced that Busch had the requisite minimum contacts with the United States, the court is not required to address the waiver argument.[4] The Eleventh Circuit has said that for purposes of the minimum contacts analysis, the defendant's contacts with the requisite forum must satisfy three criteria. *United States Securities and Exchange Commission v. Carrillo*, 115 F.3d 1540, 1542 (11th Cir. 1997). First, the contacts must be related or give rise to the plaintiff's cause of action. *Id.* Second, the contact must entail an act in which the defendant has purposely availed himself of the privilege of conducting activities within the forum; thus, invoking the benefits and protections of its laws. Id. Third, the defendant's contacts must be of the nature that he should "reasonably anticipate" being haled into court there. *Id.*

The Commission contends that the requisite minimum contacts with the United States are established by the fact that Dr. Busch, as owner of Chateauforte Consortium, Inc., through his agents James Michael Hanks and William Amos, solicited United States residents to

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[4]When a cause of action arises under a federal statute that permits nationwide service of process, the appropriate forum for which the defendant must have minimum contacts is the entire United States. See 7 U. S. C. 13a-1; *United States Securities and Exchange Commission v. Carrillo*, 115 F.3d 1540, 1542 (11th cir. 1997).

invest in the Millennium Fund, and that Dr. Busch traded investor money within the United States. Dr. Busch's only response appears to be that Hanks and Amos were not his agents.

The defendant's argument is undermined by Dr. Busch's December 27, 1999, letter to Chateauforte Investors, including Howard Smith, a resident of Muscle Shoals, Alabama, and a plaintiff in a companion case, *Smith, et al. v. Busch, et al.*, Case No. CV-99-PWG-0024-S (N.D. AL 1999). One portion of the letter states, "[t]he good fortune that we experienced originally was thwarted when *La Prensa*, a Panamanian newspaper, ran a series of negative articles regarding the fund early in 1998, which resulted in the *closing of our major trading account by ABN AMRO in Chicago.*[5] (emphasis added). In addition, the communication refers to funds presently being retained in frozen trading accounts in the United States. Furthermore, Dr. Busch's allegations concerning Hanks are not supported by the evidence or record. In his own affidavit, Hanks states *inter alia*, that (1) Dr. Busch, on behalf of Chateauforte, agreed to pay him a commission, in connection with the introduction of clients in the United States who purchased shares in the Millennium Fund; (2) Dr. Busch had met personally with individuals or their representatives who Hanks had introduced and who later purchased Millennium shares; (3) Dr. Busch signed commission payment checks; and (4) Hanks understood that Busch was a principal of Chateauforte. Hanks' activities took place within the United States.

Dr. Busch's contacts are related to the present cause of action because the handling and management of the fund is at the center of the Commission's action. The actions of Mr. Hanks in respect to introducing fund investors are similarly related. Under the second prong of the analysis, Dr. Busch purposely availed himself of the privileges and benefits of conducting his activities in the United States because he made a conscious choice to induce residents of the United States to invest in the fund, and he, in his role or *overseeing* the trading of the fund, was surely aware of, and approved, the "major" trading account being handled by a Chicago, Illinois merchant. As for the final prong, because American merchants handled accounts and American residents contributed to them, Busch could reasonably expect that he would be

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[5]In the letter, Dr. Busch describes his role as "overseeing trading."

subject to the jurisdiction of courts in the United States.

## V. *Groupo Mexicano de Desarroloo, S. A. v. Alliance Bond Fund, Inc.*

During the course of these proceedings the defendant has argued that *Groupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961 (1999), stands for the proposition that this court can not enjoin a foreign company's assets before a final adjudication of the investment funds.[6] The defendant misread *Groupo*. That case is not particularly remarkable in holding as it does that in a suit for damages a court generally may not enter an injunction to freeze a party's assets prior to an adjudication on the merits of the lawsuit. First, and foremost, this is not an action for money damages, but is, instead, a statutorily authorized suit in equity brought by an agency of the United States government charged with the responsibility to regulate activities such as are at the heart of this action for the protection of the citizenry of the United States. The court agrees with the Commission that *Groupo Mexicano* is inapposite for that reason. *See id.* at 1971-2.

## VI. Conclusion

After careful consideration and review, the motion of the defendant to alter, amend, or vacate and stay of execution and defendant's motion to dismiss for want of personal and subject matter jurisdiction hereby are DENIED in all respects.

Moreover, the defendant's motions being denied, it is now appropriate to address the plaintiff's motion to hold the defendant in contempt of the court for his failure to comply with the terms of the mandatory permanent injunction entered on March 5, 1999. Because the defendant may have truly believed that he was not properly served with process at the time he was permanently enjoined, it is reasonable and proper to afford him one last opportunity to comply with the terms of the injunction before facing sanctions. Accordingly, the defendant

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[6]This argument was not raised in the defendant's December 10, 1999, Memorandum of Law.

Richard E. Busch will be ALLOWED a period of fifteen (15) days from the date on which this order is entered to CERTIFY to the court in writing, under oath, that he has fully complied with the terms of the mandatory permanent injunction entered on March 5, 1999. If such certification has not been filed with the court within the requisite time period, the court will direct the clerk of the court to issue a warrant for the arrest of Dr. Richard E. Busch returnable *instanter* to this court.

Done, this _____ of March, 2000.

_____

EDWIN NELSON
UNITED STATES DISTRICT JUDGE

# TITLE 17 - COMMODITY AND SECURITIES EXCHANGES

## TRADING COMMISSION

## PART 15 - REPORTS - GENERAL PROVISIONS
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Sec. 15.05 Designation of a futures commission merchant or introducing broker to be traders.

(a) For purposes of this section, the term "futures contract" means any contract for the purchase or sale of any commodity for future delivery traded or executed on or subject to the rules of any contract market; the term "option contract" means any contract for the purchase or sale of a commodity option traded or executed on or subject to the rules of any contract market; the term "customer" means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term "communication" means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as other written document or correspondence.

(b) Any futures commission merchant who makes or causes to be made any futures contract or option contract for the account of any foreign broker or foreign trader, and any introducing broker who introduces such an account to a futures commission merchant, shall thereupon be deemed to be the agent of the foreign broker or the foreign trader for purposes of accepting delivery and service of any communication issued by or on behalf of the Commission to the foreign broker or the foreign trader with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. In the case of a futures commission merchant who makes or causes to be made any futures or option contract for the account of a foreign broker, the futures commission merchant and the introducing broker, if any, shall also be the agent of the customers of the foreign broker (including any customer who is also a foreign broker and its customers) who have positions in the foreign broker's futures or option contract account carried by the futures commission merchant for purposes of accepting delivery and service of any communications issued by or on behalf of the Commission to the

customer with respect to any futures or option contracts which are or have been maintained in such accounts carried by the futures commission merchant. Service or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant or to an introducing broker pursuant to such agency shall constitute valid and effective service or delivery upon the foreign broker, a customer of the foreign broker or the foreign trader. A futures commission merchant or an introducing broker who has been served with, or to whom there has been delivered, a communication issued by or on behalf of the Commission to a foreign broker, a customer of the foreign broker or the foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign broker, a customer of the foreign broker or the foreign trader.

Supreme Court, U.S.
FILED
OCT 31 2001
OFFICE OF THE CLERK

No. 01-363

# In the Supreme Court of the United States

RICHARD E. BUSCH, PETITIONER

*v.*

COMMODITY FUTURES TRADING COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in concluding that service of process was effected in this case under Rule 4(e)(2) of the Federal Rules of Civil Procedure, when a copy of the summons and complaint was delivered to petitioner's lawful agent.

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 12-14) and of the district court (Pet. App. 15-28) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 23, 2001. A petition for rehearing was denied on May 30, 2001 (Pet. App. 10-11). The petition for a writ of certiorari was filed on August 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a foreign trader who participated in a scheme to defraud United States citizens. Pet. App. 20, 26; see 17 C.F.R. 15.00(a)(2)(e).* In July 1998, the Commodity Futures Trading Commission (Commission) filed a complaint against petitioner and others for violations of the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and regulations thereunder. In February 1999, the Commission moved for entry of a default judgment against petitioner. The Commission explained that it had served petitioner in two different ways. First, the Commission delivered a copy of the summons and complaint to the Chicago offices of Alaron Trading Corporation (Alaron), petitioner's domestic agent under the foreign trader regulations (17 C.F.R. 15.05(b)), effecting service pursuant to Fed. R. Civ. P. 4(e)(2). Second, the Commission served petitioner himself in Panama City, on January 9, 1999, effecting service pursuant to Rule 4(f)(3). Pet. App. 14, 16.

On March 5, 1999 the district court granted the Commission's motion and entered a default judgment against petitioner. The court further ordered petitioner to make full restitution to victims of his financial fraud within thirty days, finding:

> [Petitioner] has misappropriated investor funds and has omitted to inform investors that their funds would be deposited in non-Fund controlled accounts. As a result, [petitioner] has illegally solicited at least fourteen (14) Alabama residents to invest a

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* A "foreign trader" is a trader who is domiciled or resides outside of the United States and is "a person who, for his own account or for an account which he controls, makes transactions in commodity futures or options, or has such transactions made." 17 C.F.R. 15.00(a)(2)(e).

total of at least $10,849,000 in the Fund in amounts ranging from $190,000 to $2,220,000.

I C.A. Rec. 2. Pursuant to 7 U.S.C. 13a-1(d)(1), petitioner was assessed a civil monetary penalty of $32,547,000, representing triple the monetary gain that he received as a result of his violations of the CEA and the Commission's regulations. Pet. App. 18.

Petitioner did not comply with that order and, on April 16, 1999, the court ordered him to appear and show cause why he should not be held in contempt. Counsel for petitioner appeared and contested the sufficiency of service of process upon petitioner. In particular, counsel argued that petitioner was not in Panama City on January 9, 1999, and that he had not been served personally with the summons or complaint. Following an evidentiary hearing, the district court rejected that argument and found that petitioner had been properly served. The district court gave petitioner until June 21, 1999, to comply with the court's judgment or face issuance of an arrest warrant for contempt. Pet. App. 18-19.

2. Petitioner then moved to vacate the default judgment, arguing that the service of process was insufficient and that he lacked sufficient contacts with the United States to establish personal jurisdiction. On March 14, 2000, after conducting a second evidentiary hearing, the district court denied petitioner's motion, concluding (again) that petitioner had been properly served and finding that he possessed "the requisite minimum contacts with the United States" to establish personal jurisdiction. Pet. App. 25; see *id.* at 15-28.

In particular, the district court found that on January 5, 1999, the Commission had delivered the summons and complaint to Alaron's Chicago offices; that "Alaron

was, for purposes of service, an agent of [petitioner]" under 17 C.F.R. 15.05(b); and that petitioner was therefore properly served pursuant to Fed. R. Civ. P. 4(e)(2). Pet. App. 20. The court rejected the argument that, as a matter of law, the Commission was required to prove that Alaron actually "transmitted notice of the suit to [petitioner]." *Ibid.* The court explained that that burden not only is not imposed by the foreign trader regulations or other law, but, if adopted, "would place the Commission at the mercy of the defendant's agent and would frustrate the Commission in the performance of its statutory duty to regulate the activities of persons such as [petitioner], and, in so doing, to protect the citizens of the United States from unscrupulous traders." *Id.* at 22. The court also noted that "[petitioner] does not actually deny that he received the summons and complaint from Alaron." *Id.* at 21 n.2.

The district court further found that petitioner was served in person with a copy of the summons and complaint in Panama City. Pet. App. 25. But the court did not rely on that service because it concluded that the Commission did not show that that service had been made in accordance with Panama law, as the court believed was required by Fed. R. Civ. P. 4(f). *Id.* at 23-25.

The district court gave petitioner "one last opportunity to comply with the terms of [its prior restitution order] before facing sanctions," and instructed petitioner to do so within fifteen days. Pet. App. 27-28. The court further ordered that if petitioner failed to certify compliance within that period, a warrant would be issued for his arrest. *Id.* at 28. Petitioner failed to comply with that order and, on April 4, 2000, the court issued a warrant for his arrest, which remains outstanding.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 12-14. The court held that "the record clearly reflects that [petitioner] was served process in accordance with Rule 4(e)." *Id.* at 14. The court explained that "[u]nder 17 C.F.R. § 15.05, [Alaron] was a lawful agent of [petitioner], a 'foreign trader' under the regulations," and that "it is undisputed that [the Commission] served a copy of the summons and complaint upon Alaron." *Ibid.* The court rejected the argument that the regulations required the Commission "to ensure that Alaron fulfilled its legal obligation to forward the summons and complaint on to [petitioner]," explaining that "[n]othing in the case law or regulations themselves supports such a reading, nor do we think it makes sense to place a plaintiff at the mercy of a defendant's agent in the service of process upon a defendant." *Ibid.*

Because the court of appeals concluded that service was proper under Rule 4(e)(2), it did not "address whether [petitioner] was served in Panama in compliance with Fed. R. Civ. P. 4(f)(3)." Pet. App. 14 n.3. The court also did not reach the Commission's argument that, because he is a fugitive from justice, petitioner should not be permitted to press his appeal at all. *Id.* at 13 n.1; see *Ortega-Rodriguez* v. *United States*, 507 U.S. 234 (1993).

## ARGUMENT

Petitioner renews (Pet. 1-7) his argument that service of process was insufficient. The courts below properly rejected that contention, and the unpublished decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 1) that 17 C.F.R. 15.05(b) imposes "a mandatory notice requirement" upon the Commission to establish not only that it served the lawful agent of a foreign trader, but also that that agent notified the trader of the suit. That is incorrect. The foreign trader regulation provides that "[s]ervice or delivery of any communication issued by or on behalf of the Commission to a futures commission merchant * * * shall constitute valid and effective service or delivery upon the * * * foreign trader." 17 C.F.R. 15.05(b). As the courts below concluded, under that provision "service is completed upon delivery of the summons and complaint to the futures merchant and not when they are subsequently transmitted to [the] foreign broker or trader." Pet. App. 22; see *id.* at 20.

To be sure, the regulation also directs the agent to "transmit the communication promptly and in a manner which is reasonable under the circumstances * * * to the * * * foreign trader." 17 C.F.R. 15.05(b). But the regulation in no way makes the effectiveness of service of process contingent upon the Commission's ability to prove that the agent complied with its independent duty to transmit notice to the foreign trader. Moreover, as the court of appeals explained, that interpretation not only is not supported by the regulation, but would place the Commission "at the mercy of the defendant's agent and would frustrate the Commission in the performance of its statutory duty to regulate the activities of persons such as [petitioner]." Pet. App. 20; see *id.* at 22. And such an interpretation would be especially unwarranted in this case, where the district court found that petitioner in fact received a copy of the summons and complaint, and thus plainly had notice of the action. *Id.* at 21 n.2l, 25.

That conclusion is consistent with the Federal Rules of Civil Procedure. Rule 4(e)(2) provides that service of process may be effected by delivering a copy of the summons and complaint to "an agent authorized by appointment or by law to receive service of process." Petitioner does not challenge the finding of the courts below that Alaron was a lawful agent of petitioner pursuant to the foreign trader regulations. Pet. App. 14, 20. Rule 4(e)(2) does not impose upon a plaintiff any burden of proving that the lawful service agent performed its agency obligations.

2. Nor is there any merit to petitioner's suggestion (Pet. 1) that failure to require the Commission to prove that the lawful agent gave petitioner notice of the complaint would raise due process concerns. In *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 707 (1988), this Court recognized that a foreign entity may be served through a lawful domestic agent, and that "the Due Process Clause does not require an official transmittal of documents abroad every time there is [domestic] service on a foreign national." Moreover, as discussed above, there can be no serious dispute that the Commission reasonably attempted to provide petitioner with notice of this action; it *personally* served him with the complaint in Panama City. Pet. App. 25. Nothing in *National Equipment Rental Limited* v. *Szukhent*, 375 U.S. 311 (1964), bolsters petitioner's due process argument. Indeed, no due process claim was made in that case because there, as here, the defendants in fact received notice of the suit against them. *Id.* at 315.

3. Finally, "[i]t has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez* v. *United*

*States*, 507 U.S. 234, 239 (1993). A criminal defendant who remains at large may forfeit his right to "call upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (per curiam). Petitioner "is currently a fugitive," Pet. App. 13 n.1, and his fugitive status provides further reason to deny his request for review in this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2001